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THE RESOLUTION OF CONFLICTS OF LAW: A VIEW FROM PRIVATE INTERNATIONAL LAW IN CUBA

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I. INTRODUCTION

The "procedural" and "cooperative" aspects of Private International Law have gained greater influence and development than those of applicable law, which traditionally have been considered the essential content. As Professor Fernández Arroyo points out, this change is directly related to the exponential increase in cases of Private International Law, that is, with the movement from academic Private International Law to concrete Private International Law.[1]

The essential debate about contemporary Private International Law seeks to establish a just method of distributing private international cases among the various jurisdictions, as a function of the fundamental right of

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1. Fernández Arrollo, Diego P.: Propuestas para una evolución deseable del problema de la competencia judicial internacional, en http://asadip.files.wordpress.com/2009/01/dpfa-homenaje-a-gualberto-lucas-sosa.pdf bajado el 14 de mayo de 2013. En este mismo orden y citado por el autor ver E. Jayme, « Identité culturelle et intégration: le droit international privépostmoderne », *Recueil des Cours*, t. 251 (1995), pp. 47-48. B. Audit, « Le droit international privé en quête d'universalité. Cours général (2001) », *Recueil des cours*, t. 305 (2003), p. 478 ("la situación ha cambiado totalmente con el verdadero desarrollo de las relaciones privadas internacionales a lo largo del siglo XX, hasta colocar hoy en primer plano las cuestiones vinculadas con la administración de las jurisdicciones de los Estados y de la justicia internacional de derecho privado").

access to justice in its private international dimension. If there is agreement about the minimum basis for realizing this distribution, and such an agreement is supplemented with a predisposition towards international cooperation in the field of Private International Law (whose supreme expression is cooperation in implementing the decisions made by foreign authorities), the problems regarding private international causes may be resolved with relative ease. But what is certain is that, with the exception of the integrated European community, where—despite notable defects—a great development of both premises has been achieved, questions relating to international legal jurisdiction continue to provoke huge difficulties, both practical and theoretical.

The determination of the criteria for the international jurisdiction of legal tribunals takes on many special features in the various legal systems. In some systems it is feasible to locate a more-or-less applicable regulation without difficulty, while in others it is necessary to confront the lack of rules addressing the topic. The absence of such regulations may be resolved through the application of rules analogous to those established for cases of internal jurisdiction,[2] a solution that has not gone without criticism.

Each State establishes the structure of litigation and the bodies that should hear cases arising within the internal order, according to the different criteria that define the extent of their jurisdiction, which must be outlined according to a variety of factors, including the subject matter, quantity, institutional and territorial hierarchy. These are joined by conditions and principles through which judicial bodies can hear and resolve cases arising from certain private international cases.[3]

II. GENERAL OVERVIEW OF INTERNATIONAL JURISDICTION IN CUBA

In the Cuban context, we have to look first to the system established by the Convention on Private International Law, which adopted the Bustamente Code (Código de Derecho Internacional Privado).[4] Confronting this regulatory, jurisprudential, and doctrinal austerity, we will delve into the conditions and principles by which Cuban judicial bodies can hear and resolve cases arising from private legal actions of an

2. *See* Fernádez Rozas, José C. y Sánchez Lorenzo, Sixto, *Derecho internacional privado*, 2da. edic. Cívitas, Madrid, 2001, p.83 y Fernández Arroyo, Diego P., "Aspectos generales del sector de la jurisdicción internacional" en *Derecho internacional privado de los Estados del MERCOSUR* (Coordr. Fernández Arroyo, Diego P.), Zavalia, Buenos Aires, 2003, p. 147.

3. Fernández Rozas, José C., y Sánchez Lorenzo, Sixto, *Derecho internacional privado* . . . , ob. cit., p. 45.

4. Signed February 20, 1928, published in Cuba in *edición extraordinaria de la Gaceta Oficial* No. 16 on May 20 and November 10 of 1928. Matos, J., O. Rodrigo, O., y Sánchez De Bustamante y Sirvén, Antonio, *Revista de Derecho Privado Internacional*, 1926, pp. 116–121.

international character.

In Cuba, the regulatory framework for international jurisdiction begins at the conventional level, with special attention to the Bustamente Code, whose implementation affects our country through its incorporation as a Member State, considering the area of its implementation and its limits as defined in this international regulation. This is combined, in relation to its placement in the system we are analyzing, with the regulations in our law that are applicable to all private relationships involving States that are not parties to this convention. We will next proceed to the presentation and assessment of these systems.

A. *International Jurisdiction in Civil and Commercial Matters*

In terms of structure, the Bustamente Code dedicates the second title of book four to regulating jurisdiction, and encompasses common, general rules of civil and commercial jurisdiction, as well as their exceptions and those applicable general rules of criminal jurisdiction.

Referring to the general rules of civil and commercial jurisdiction, a system of jurisdictional forums is established in international matters on two levels. In the first of these, the will of the parties is considered, and jurisdiction is assigned to whatever judge to which the litigants submit expressly or tacitly, within the limits established by Articles 318, 319, and 320 of the same regulation. Article 318 especially prioritizes free will as the dominant criterion in selecting the appropriate forum in civil or commercial cases, imposing as a precondition that one of the parties be a national of, or domiciled within, one of the Contracting State parties.[5] The virtual will of the parties in the determination of international jurisdiction comes in two forms: express submission and tacit submission.[6]

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5. Art. 318. Será en primer término juez competente para conocer de los pleitos a que dé origen el ejercicio de las acciones civiles y mercantiles de toda clase, aquel a quien los litigantes se sometan expresa o tácitamente, siempre que uno de ellos por lo menos sea nacional del Estado contratante a que el juez pertenezca o tenga en él su domicilio y salvo el derecho local contrario. Art. 321. Se entenderá por sumisión expresa la hecha por los interesados renunciando clara y terminantemente a su fuero propio y designando con toda precisión el juez a quien se sometan. Art. 322. Se entenderá hecha la sumisión tácita por el demandante con el hecho de acudir al juez interponiendo la demanda, y por el demandado con el hecho de practicar, después de personado en el juicio, cualquier gestión que no sea proponer en forma la declinatoria. No se entenderá que hay sumisión tácita si el procedimiento se siguiera en rebeldía.

6. The Code defines express and tacit submission in Articles 321 and 322. Express submission is understood as being made "when the parties renounce their own forums clearly and with finality, and designate with great precision the judge to whose authority they will submit." It should be noted that it is not sufficient for the parties to clearly designate a court with jurisdiction to hear the case; an equally clear renunciation of the alternative forum is also necessary. In this sense the Code differs from current doctrine, under which a renunciation is understood to have been made simply by submitting to another jurisdiction. Article 322 next establishes that tacit

Article 323 next offers a solution for cases in which autonomous will has not been exercised, with the proviso that local law not be opposed, in which case a competent judge shall be designated from the place in which the legal obligation is performed, or from the place of residence or domicile of the defendants. Article 324 establishes that cases involving personal property shall be heard by a judge from the same jurisdiction as the plaintiff, and if this is not known or is unavailable, from the place of residence or domicile of the defendant.[7]

As may be seen, this Code favors the exercise of free will to define international jurisdiction, although it requires other related elements (*e.g.*, one of the parties must have nationality or domicile in the same country as the court that is to hear the case). In addition to the preceding condition, this rule has two exceptions or limitations on the exercise of *prorrogatio fori*: first, if local law is to the contrary,[8] and second, with respect to cases involving real estate, if applicable law prohibits it. These conditions and exceptions seriously limit the exercise of forum selection.[9]

Among the regulations that compose the jurisdictional system of Cuban courts, the rules of Cuban civil procedure are relevant both to civil matters as well as to related economic and commercial questions, and even extend to the private causes arising from international commerce.

The regulation of the procedural order is found in the Law of Civil, Administrative, Labor, and Economic Procedure,[10] whose rules about the jurisdiction of Cuban courts attempt to define which matters ought to be heard in the country. We have concentrated on analyzing the procedural

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submission will be understood as the plaintiff's act of filing the claim with the judge, and the defendant making any response other than a demurrer. The Article clarifies that a default will not be understood as tacit submission.

7. Chapter II, which establishes the Exceptions to the General Rules of Civil and Commercial Jurisdiction, makes an exception for States or Heads of State when a personal claim is exercised except in the case of express submission or counterclaims.

8. This exception made by Bustamente in his Code is used repeatedly, and has been criticized for frequently implying the non-resolution of conflicts of laws and jurisdictions, one of the primary purposes of the treaty.

9. In the absence of forum selection, Articles 323 and 324 establish jurisdiction for cases involving personal or property claims.

Art. 323. Fuera de los casos de sumisión expresa o tácita, y salvo el derecho local contrario, será juez competente para el ejercicio de acciones personales el del lugar del cumplimiento de la obligación, o el del domicilio de los demandados y subsidiariamente el de su residencia. Art. 324. Para el ejercicio de acciones reales sobre bienes muebles será competente el juez de la situación, y si no fuere conocida del demandante, el del domicilio, y en su defecto el de la residencia del demandado.

Art. 326. Si en los casos a que se refieren los dos artículos anteriores hubiere bienes situados en más de un Estado contratante podrá acudirse a los jueces de cualquiera de ellos, salvo que lo prohíba para los inmuebles la ley de la situación.

10. Ley No. 7, de Procedimiento Civil Administrativo y Laboral de 19 agosto de 1977. Gaceta Oficial No. 34 de 20 de agosto de 1977 (Última actualización 6 de abril del 2004), en lo adelante LPCALE.

law of civil cases as well as economic and commercial ones, taking into account the supplementary character of the civil rules with respect to special ones, in accordance with Article 8 of the Civil Code as well as the subsequent Special Provision One contained in Decree-Law 241/2006,[11] which incorporates Book Four of the Cuban Law of Economic Procedures [*Ley de trámites cubana sobre el Procedimiento de lo Económico*], which also adopts in a supplementary manner the provisions related to civil and economic procedure.

The first part of procedural law refers to civil procedure, regulated in book one, Title I, "Of Jurisdiction and Venue," with Chapter I dedicated to jurisdiction and Chapter II to venue. However, neither specifies how they should be applied in international matters. Article 2 and 3 define the civil jurisdiction of Cuban courts and provide the basic principles for the system of legal venue, whose reach extends to questions of international commerce.

Article 2 establishes that "this jurisdiction will hear: 1. civil questions arising between natural and legal persons, provided at least one of them is Cuban; 2. those arising between foreign natural and legal persons with representation or domicile in Cuba, as long as the *litis* does not involve assets located outside of Cuba; 3. matters assigned by contract or treaty to the jurisdiction of Cuban Tribunals." For the purpose of its application, we should keep in mind the determination of citizenship or nationality of natural and legal persons,[12] the location of property in Cuba as a territorial forum, and whether the jurisdiction was accepted expressly or tacitly.[13]

As can be seen, Article 3, subsection 3, permits the parties to consent to the jurisdiction of Cuban courts by contract or treaty, with such a broad scope that in application it could even address matters of an international character. The parties can choose to accept the jurisdiction of Cuban courts (*prorrogatio fori*), as these should understand the matters that are submitted for their hearing and resolution.[14]

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11. Publicado en la Gaceta Oficial Extraordinaria No. 033 de 27 de septiembre de 2006, pp. 327-335.

12. Articles 28 through 33 of the Constitution of the Republic of Cuba establish the citizenship criteria for natural persons, including the acquisition of citizenship (by birth or naturalization) and its loss. Constitución de la República de Cuba, publicada en la Gaceta Oficial número 16 de 15 de febrero de 1976, reformada el 12 de julio de 1992. Publicada en Gaceta Oficial No. 7, edición extraordinaria el 1 de agosto de 1992, Última modificación G.O.E. No. 3 de 31 de enero de 2003.

13. Article 9 of LPCALE defines express submission as occurring when the parties clearly renounce their own forums and clearly identify the Court to whose jurisdiction they will submit. Article 10 defines tacit submission as occurring: (1) when the plaintiff files a lawsuit with the Court; (2) when the defendant does not file a timely demurrer.

14. This is an example of our legislation expanding jurisdiction in favor of forum selection, allowing the parties to submit any claims to a specific legal tribunal. *See* D. Rossatti, Horacio, "Prórroga de jurisdicción y soberanía estatal," en *Revista latinoamericana de derecho*, Año II,

Article 3 of this provision establishes the obligatory character of the jurisdiction of Cuban courts by affirming that: "the jurisdiction of Cuban courts is indeclinable. The Courts cannot refuse to hear a case if any of the litigants is Cuban or refers to property located in Cuba, even if a pending case exists in another country or has been submitted to foreign courts or arbitration."[15] In this sense, I note that this article offers an answer to the problem of international litigation, refusing to recognize cases dealing with a lawsuit between foreigners regarding property located outside Cuba.

To complete this analysis, we must bring up the provisions of Decree-Law 241 of 2006, which incorporates Part Four into the Law of Civil, Administrative, and Labor Procedure, dealing with economic procedure, whose Chapter I regulates questions related to jurisdiction and venue of the economic courts [*salas de lo económico*].

Article 739 of this provision sets out the jurisdictional rules for these courts. Accordingly, they will hear lawsuits arising between natural or legal persons—both Cubans and foreigners with representation, property, or other interests in Cuba—that involve their contractual relations, except when they involve the sphere of public consumption. Lawsuits are likewise excluded where the parties have expressly or tacitly submitted to international commercial arbitration, whether by provision of law or by treaty, without prejudice to the assistance that must be rendered in such proceedings at the request of the parties or the request of the court of arbitration.

Unlike the criteria for international jurisdiction in the Bustamente Code, and Article 2 on litigation in the civil, administrative, or labor sphere of civil procedure, Article 742 of Decree-Law 241 of 2006 specifically defines the venue for non-contractual claims: "The Economic Courts [*Las salas de lo Económico*] shall also hear non-contractual claims regarding the damages and losses caused to third parties in their economic activities by natural or legal persons, whether Cuban or foreign, as part of their productive, commercial, or service activities on national territory."

As can be seen, the jurisdiction of these forums is very similar to that established by civil procedure, only adding interests in Cuba as a basis for jurisdiction in economic and commercial matters. As regards venue in non-contractual claims, the rule abandons the partiality for choice of forum criteria used by the Bustamente Code as well as by our procedural

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núm. 4, julio-diciembre de 2005, pp. 297-299.

15. Except as provided in the previous paragraph, controversies that arise in international commerce and that are submitted tacitly or expressly, or by disposition of law or international treaty, to arbitration courts. [Se exceptúa de lo establecido en el párrafo anterior las controversias que surjan en el comercio internacional y que se sometan expresa o tácitamente, o por disposición de la ley o por acuerdos internacionales, a cortes arbitrales.].

law. In this case the focus is on non-contractual claims involving damages and losses to third parties in their economic activity. Of course, it must be remembered that the articles previously analyzed involve general jurisdiction, embracing a wide array of conflicts, and are very comprehensive. By contrast, this forum is used specifically for non-contractual claims.

B. *Definition of Internationality*

The internationality of a cause of action or case is a highly debated topic in Private International Law about which there has been no consensus, although there are several general positions. The solution has been to identify the effects in each regulatory text or provision that may be understood as international. This solution was adopted by Decree-Law 250 of the International Commercial Arbitration Court.[16]

Article 9 defines international litigation as occurring when "the parties' places of establishment or habitual residence are in different countries, or the parties are domiciled in the same State but are natural or legal persons with different citizenships or nationalities, or the place of the agreement or for the fulfillment of an obligation is in a different State." The greater difficulty in the internal order lies in that it is the only regulatory provision that defines the elements that allow arbitrators to determine when they are presented with an international claim, and consequently may hear it.

We must keep in mind that more recent trends define internationality in much broader terms, as opposed to nationality.[17]

C. *The Use and Respect for Free Will in Forum Selection*

It is interesting to see that in the aforementioned forums [*foros*] that regulate international legal jurisdiction in Cuba, the Bustamente Code favors free will, subject to the nationality or domicile of one of the parties, and outside this code, it is a forum with jurisdiction over civil matters, not over economic and commercial claims. Subsection 3 of the procedural law allows the Cuban State to hear a claim if the parties agree by contract. This possibility does not appear in the most recent regulation of the international legal jurisdiction of the economic chambers [*las salas*

16. Published in Gaceta Oficial Extraordinaria No. 037 de 31 de julio de 2007.

17. Such as The Hague Convention of 30 June 2005 on Choice of Court Agreements, under the auspices of The Hague Conference on Private International Law, which establishes that a situation is international unless the parties are residents of the same contracting State, and the cause of action between the parties and all other relevant factors in the case, regardless of the location of the chosen court, are solely connected to that State. (*DO* L 353, Dec. 10, 2014).

de lo económico] of the Cuban courts. Decree-Law 241 of 2006 does not offer this possibility, eliminating free will as sufficient grounds for granting jurisdiction to a Cuban court. Paradoxically, this occurs even though commercial claims are the area in which the internal legal order most favors free will, and are the only claims that can be removed from the courts and gain access to international commercial arbitration.

On the other hand, nothing prevents the parties to an international contract from choosing a foreign court to resolve their conflicts, even if one party is Cuban or domiciled in Cuba. In these cases, it must be remembered that, according to Article 3 of Cuban procedural law, the jurisdiction of Cuban courts is compulsory except in matters subject to international commercial arbitration. Consequently, a situation could arise in which, despite the existence of an agreement accepting the jurisdiction of a foreign court, one of the parties introduces the claim in a Cuban court, which pursuant to Article 3 could not refuse to hear the claim if it involved jurisdictional grounds established by law (Cuban nationality of one of the parties, or the presence of their domicile, representation, property or interests in Cuba if they are foreign), unless the *litis* were between foreigners or the subject of the litigation was property located outside the national territory. This situation is not hypothetical, and clearly goes against good faith negotiating and legal security in international trade.

D. *Definition of Courts of Exclusive Jurisdiction*

The principle of concurrent jurisdiction relies on States accepting the jurisdictional authority of other States that also may hear matters of private international litigation. This principle stands opposed to what is known as courts of exclusive jurisdiction, which are always developed through mandatory regulations.

The exclusive authority to hear certain international disputes plainly implies not recognizing the existence of an alternative forum for the same case, and consequently not recognizing any decision another forum may have previously made. As a result, exclusive jurisdiction excludes *ab initio* any possibility of recognizing a foreign decision on the same matters.

Certain courts of exclusive jurisdiction are introduced into the Cuban legal system by Law 118 of 2014,[18] the Law of Foreign Investment, which in Chapter XVII "Of the Conflict Resolution System" provides that economic courts [*la Sala de lo Económico del Tribunal Provincial Popular*] will resolve all cases involving: 3.- Conflicts arising from the inaction of the governing bodies of foreign investment modalities, or the

18. Published in Gaceta Oficial No. 20 de 2014.

dissolution and liquidation of these, and 4.- Conflicts arising among the partners of a Mixed-Ownership Enterprise or a Wholly Foreign-Owned Enterprise, or among domestic and foreign investor parties to international Economic Partnership Agreements, which have been authorized to carry out activities related to natural resources, public services, and the execution of public works. These matters are to be resolved by the corresponding economic court [*Sala de lo Económico del Tribunal Provincial Popular*], except as otherwise provided in the Authorization.

III. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The recognition and enforcement of foreign judgments in Cuba is an important topic in the internal order, both in terms of the application of the Bustamente Code in cases where the countries are signatories, and the internal procedural rules in all other cases.

Title X of the Bustamente Code sets out the general requirements for enforcing the judgments of foreign courts, in order to facilitate the circulation of foreign legal rulings with the necessary guarantee of legal security.[19]

Their regulation in the internal order presents theoretical and practical difficulties. Article 483 of our procedural law establishes the general conditions for the Cuban legal system to recognize and subsequently enforce a foreign judgment. This article would be invoked to resolve disputes between Cuba and Spain, given the lack of a convention between these countries.

The first condition established by this precept is "that the rulings have been issued as a result of the exercise of personal jurisdiction." This article eliminates the possibility of recognizing and enforcing a lawsuit based on *in rem* jurisdiction. As may be seen, despite not having an exclusive forum for property claims, there is indirect international jurisdiction over these matters. There must be a systematic relationship

19. Chapter I. Civil Matters, in its Article 423 establishes: "Toda sentencia civil o contencioso-administrativa dictada en uno de los Estados contratantes, tendrá fuerza y podrá ejecutarse en los demás si reúne las siguientes condiciones: 1. Que tenga competencia para conocer del asunto y juzgarlo, de acuerdo con las reglas de este Código, el juez o tribunal que la haya dictado; 2. Que las partes hayan sido citadas personalmente o por su representante legal, para el juicio; 3. Que el fallo no contravenga al orden público o al derecho público del país en que quiere ejecutarse; 4. Que sea ejecutorio en el Estado en que se dicte; 5. Que se traduzca autorizadamente por un funcionario o intérprete oficial del Estado en que ha de ejecutarse, si allí fuere distinto el idioma empleado; 6. Que el documento en que conste reúna los requisitos necesarios para ser considerado como auténtico en el Estado de que proceda, y los que requiera, para que haga fe, la legislación del Estado en/que se aspira a cumplir la sentencia."

between the jurisdictions and the subjects that are excluded at the time of their recognition to any effect in Cuba. [En este orden, debería haber una sistematicidad entre los foros de competencia y las materias que se excluyen al momento de su reconocimiento a cualquier efecto en Cuba.]

Subsection Two provides that the judgment cannot have been rendered in default of the defendant. That is to say, the parties must have participated in the judicial process. There has been much debate over how the issue of default should be interpreted in international cases, given the danger that an international default would render the effects of a judicial ruling ineffective. In this sense, attempts to achieve greater fluidity, efficiency, and legal security in international commerce have sought to protect against a "state of helplessness" in which the defendant has not been duly summoned or notified of the process.

Another requirement that creates certain difficulties is that of reciprocity, as it requires that the ruling whose enforcement is sought be accompanied by a communication from the Ministry of Foreign Affairs of the country in which it was made, affirming that the latter will enforce Cuban rulings as a sign of reciprocity. This requirement has delayed the circulation of many foreign rulings and decisions, when there should be an equivalent system for all countries in accordance with the requirements of the law. Such a system is particularly necessary in order for countries with very hostile or adversarial relationships to recognize and accept decisions emanating from this country.

Finally, the requirement of accurately establishing the Cuban domicile of the convicted person deserves criticism. This requirement is indispensable for locating the defendant or addressee of a judgment rendered in another country and for subsequently enforcing that judgment. In our case, an appeal is made to the Supreme Court, which will hear the affected party and will rule on the request. This ruling cannot be further appealed. If the appeal is accepted, the ruling will be enforced by the appropriate court according to the domicile of the defendant. If it is not accepted, it will be returned to the soliciting party (Articles 484 and 485 LPECALE). This requirement creates new difficulties when strictly applied, as has been seen when the defendant has goods, rights, or interests in Cuba, but is not domiciled in the territory.

In the author's opinion, despite the difficulties in regulation and practice, the convention is very careful and respectful of the limitations that may be established by States so that the recognition proceeds if some of the procedural guarantees have been violated, or when involving matters that would be excluded from the possibility of adopting forum selection agreements, affecting the procedural guarantees of the defendant, or acting against public order, among other provisions in Article 9. Likewise, it is possible to request the partial recognition or execution of a ruling.

IV. CONCLUSION

Cuba finds itself updating its economic model, and one of its priorities is to promote foreign investment and trade, as the political economy is based on the need for modernization and the incorporation of advanced technology. These should be considered as an instrument that allows economies to unite, with regard to standards of production, and the process of economic globalization involving contributions of capital, technology, administrative capacity, management techniques, and access to foreign markets.

Elements to address include the elimination of extraneous forums, reflection toward international litigation, and the free exercise of forum selection, above all in matters of international commerce, as well as removing hindering factors without prejudicing the interests of Cuba, and the reception of foreign rulings. In any case, this convention was not adopted solely in imitation of other models, but rather in order to encourage reflection on this topic, to achieve a greater focus on the issue, taking into consideration the increasing incidence that it will have in the internal, regional, and global economic order. The foregoing promotes reflection and analysis of the Cuban legal system in matters of international jurisdiction and the recognition of foreign rulings, taking into consideration all factors that promote greater continuity and legal security in private international claims.

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